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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6864

WILLIAM GROSECLOSE, Petitioner,

vs.

STATE OF TENNESSEE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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June 12, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

WILLIAM GROSECLOSE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner William Groseclose respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee affirming his sentence of death for murder.

OPINION BELOW

The opinion of the Supreme Court of Tennessee affirming petitioner's conviction and sentence in a 3-1 decision is unreported. A copy of the decision and dissent is attached as Appendix A and Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Tennessee was entered on February 17, 1981, and the court's opinion on rehearing was entered on April 27, 1981.

QUESTIONS PRESENTED

1. Whether the statutory aggravating circumstance used against the petitioner is void for vagueness and overbreadth particularly with reference to the aggravating circumstance substantially similar to the b(7) statutory factor declared unconstitutional in Godfrey v. Georgia and related cases.

2. Whether the Tennessee Death Penalty Act is unconstitutional, as applied in this case, for its disproportionate sentence of the petitioner and for allowing the freakish imposition of death.

3. Whether the failure of the Tennessee Death Penalty Act to provide an effective system of comparative review of sentences renders the Death Penalty Act unconstitutional both on its face and as applied to the petitioner William Groseclose.

4. Whether failure to transcribe the argument of counsel to the jury and to provide them to the appellate court deprives petitioner Groseclose of due process of law and violates Griffin v. Illinois.

5. Whether the conviction and sentence of defendant Groseclose violates the due porcess and the equal protection guaranties in that veniermen were improperly excluded under Witnerspoon v. Illinois and Adams v. Texas.

6. Whether the conviction and the death penalty should be reversed for infringement on the presumption of innocence and denial of the right to a fair trial by the jury viewing the petitioner in handcuffs.

7. Whether the petitioner's right to confrontation and cross-examination was denied by the testimony of detective Kenneth East with respect to the confession of co-defendant Britt.

8. The jury instructions are flatly inconsistent with recent rulings as to when a death sentence may constitutionally be imposed.

STATEMENT OF THE CASE

Petitioner William Groseclose was indicted and convicted for murder in the first degree and accessory before the fact with respect to the murder of his wife along with co-defendants Ronald Rickman, Barton Mount and Phillip Britt (Technical Record at page 25-28, hereinafter cited as T.R.). Trial in this case occurred in the Criminal Court for Shelby County, Tennessee with petitioner Groseclose and co-defendant Rickman receiving the death sentence; co-defendant Britt receiving life imprisonment and co-defendant Mount testifying for the state (T.R. 160, 166-167, 173-174). Petitioner Groseclose is indigent (T.R. 176) and has remained incarcerated since the time of his arrest. The Tennessee Supreme Court has scheduled an execution date for the petitioner of August 1, 1981.

At trial, jury voir dire lasted from February 13 through February 17 and at least nineteen prospective jurors were excused either by the prosecutors or by the court for expressing scruples about the death penalty (Bill of Exceptions, VOL. 3-11 at pages 26, 50, 52, 56-48, 296, 312-316, 380, 431, 630, 724, 748, 757, 1005, 1016, 1046, 1119, 1199, 1206 and 1281; hereinafter referred to as B.E.). During jury selection, some of the jurors had contact with out-of-court personnel discussing the guilt or innocence of the defendants and the jurors viewed the defendant in handcuffs in the courtroom both during jury selection and during the trial (B.E. VOL. 3-11 at pages 695, 771-772, 805-809; and B.E. VOL. 17 at 808-809).

During the guilt phase of the trial, the state introduced the confessions of the co-defendant Rickman and the co-defendant Britt. Despite earlier rulings otherwise, testimony was adduced by the state that petitioner Groseclose employed Britt to kill his wife during introduction of the confession. A prompt Bruton

objection and motion for mistrial were made but the only result was a cautionary instruction by the trial judge (B.E. VOL. 21 at 1379, 1388, 1393-1394).

After the jury returned a guilty verdict for first-degree murder for all three defendants, the state presented no additional proof during the penalty phase. However, petitioner Groseclose presented five witnesses including himself during the penalty phase (B.E. VOL. 24 at 1761-1872) and the co-defendants presented numerous witnesses. Petitioner Groseclose's proof emphasized his youthful age (B.E. VOL. 24 at 1761); his military service including combat service in Vietnam (B.E. VOL. 24 at 1762-1763); his care for the children (B.E. VOL. 24 at 1766); his lack of any prior criminal record (B.E. VOL. 24 at 1768); his treatment by a psychiatrist and/or counselor (B.E. VOL. 24 at 1771, 1775); and that despite recent problems he had been a good worker in his employment (B.E. VOL. 24 at 1844).

Timely appeals were perfected and oral arguments in the Tennessee Supreme Court were conducted in January 1980. On February 17, 1981, the Tennessee Supreme Court affirmed the conviction and the death penalty by a 3-1 vote. A timely petition for rehearing was filed with respect to issues relating to Godfrey v. Georgia; the incomplete trial record due to the omission of the closing argument by prosecutor; and the lack of a proportionality review by the Tennessee Supreme Court. The opinion on rehearing by the Tennessee Supreme Court was entered on April 27, 1981.

REASONS FOR GRANTING THE WRIT

In 1972, this Court held that death penalty statutes as then administered, were unconstitutional. Furman v. Georgia, 408 U.S. 238. In 1976, this Court ruled that, while some new penalty statutes were unconstitutional, others appeared on their face to contain sufficient safeguards, including the provision for proportionality review, so that they could be applied constitutionally. Gregg v. Georgia, 428 U.S. 153; Woodson v. North Carolina, 428 U.S. 280. In 1980, this Court ruled in Godfrey v. Georgia, 446 U.S. 420 that the statutory aggravating factor of b(7) in Georgia was unconstitutionally applied.

This case arises under the issues of lack of proportionality review by the Tennessee Supreme Court; lack of any valid procedures for proportionality review; and the freakish imposition of the death penalty under a statutory aggravating factor substantially idential to the b(7) factor applied unconstitutionally in Godfrey. These and related issues closely divided the Tennessee Supreme Court which in a three to one opinion affirmed the imposition of the death penalty.

I. THE STATUTORY AGGRAVATING CIRCUMSTANCE USED AGAINST THE PETITIONER IS VOID FOR VAGUENESS AND OVERBREADTH PARTICULARLY WITH REFERENCE TO THE AGGRAVATING CIRCUMSTANCE SUBSTANTIALLY SIMILAR TO THE b(7) STATUTORY FACTOR DECLARED UNCONSTITUTIONAL IN GODFREY v. GEORGIA AND RELATED CASES.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that a death sentence based upon a finding of aggravating circumstances defined by Georgia Code Annotated §27-2534.1 (b)(7) cannot stand consistent with the Eighth and Fourteenth Amendments unless limiting construction is placed upon said aggravating factor by the jury instructions sufficient to "channel the sentencer's discretion by 'clear and objective' standards that provides 'specific and detailed guidance'". The (b)(7) aggravating factor found unlawful in the context of Godfrey is substantially indentical to one of the factors found to support the death penalty by the jury for William Edward Groseclose and no clear and objective limiting instruction was given. In this case, there were two aggravating factors found: the murder was especially heinous in that it involved depravity of mind and the defendant employed another to commit the crime for remuneration. In a strikingly similar case the trial jury had found two aggravating factors to support the death penalty: commission of an additional capital felony, to wit, the rape (of the victim) and that the offense was "outrageous, wantonly vile, inhuman and involved torture and depravity of mind...and aggravated battery...". Davis v. Georgia, 242 Ga. 901, 252 S.E.2d 443 (1979). On May 27, 1980, the Supreme Court of the United States reversed and vacated the death penalty and remanded in Davis v. Georgia No. 78-6891 in light of the decision in Godfrey v. Georgia.

The Tennessee court opinion which was released on February 17, 1981, does not address the Godfrey v. Georgia or Davis v. Georgia issue even though it was discussed at oral

argument and even though on August 15, 1980, a specific supplemental citation of authority relying upon Godfrey was filed with the Tennessee court.

II. THE TENNESSEE DEATH PENALTY ACT IS UNCONSTITUTIONAL, AS APPLIED IN THIS CASE, FOR ITS DISPROPORTIONATE SENTENCE OF THE PETITIONER AND FOR ALLOWING THE FREAKISH IMPOSITION OF DEATH.

Both Gregg v. Georgia, 428 U.S. 153 (1976) and T.C.A. § 39-2406(c) subsection 4 of the Tennessee statute provide that the death sentence must be examined to determine if it is excessive or disproportionate "to the penalty imposed in similar cases...". While this court in its opinion considered both the petitioner and the nature of the crime in some detail in its statement of the case, the opinion does not conduct the proportionality review mandated by Gregg and the Tennessee statute. There is no review or reference to similar cases or other cases where the death penalty has been imposed such as the cases of Mr. Austin, Mr. Ranson, Mr. Cozzolino, Mr. Moore, Mr. Strouth, Mr. Dicks, Mr. Berry and other inmates on death row in Tennessee. In addition, appellant would respectfully suggest that Gregg requires a proportionality review with other similar cases (such as State of Tennessee v. Sutton) where the death penalty was requested but only life imprisonment was imposed. See Gregg v. Georgia at 219-20, n. 5, 223, n. 11 (White, J. concurring in the judgment).

The petitioner Groseclose testified during the penalty stage of the trial only and submitted in evidence several mitigating factors such as his youthful age (B.E. VOL. 24 at 1761); his military service including combat service in Vietnam (B.E. VOL. 24 at 1762-1763); his care for the children (B.E. VOL. 24 at 1766); his lack of any prior criminal record (B.E. VOL. 24 at 1768); his treatment by a psychiatrist and/or counselor (B.E. VOL. 24 at 1771, 1775); and that despite recent problems he had been a good worker in his employment (B.E. VOL. 24 at 1844).

The co-defendant Britt presented similar as well as different evidence concerning mitigating factors such as age, religious inclination since the commission of the crime, family

concerns, good worker, and possible influence or domination by the co-defendant Rickman (B.E. VOL. 24 at 1945, 1952). The evidence during the guilt phase of the trial clearly established that the co-defendant Britt raped the victim and actually participated in the murder for remuneration.

Accordingly, it seems very strange and very difficult to understand how this same jury imposed the death penalty on one defendant and not on the other. It is easy by reference to non-statutory aggravating circumstances to understand that the prejudices of the juror may have been stronger against the petitioner Groseclose in the sense that the victim was his wife; but in terms of the statutory aggravating circumstances and the evidence of mitigating circumstances presented by both the petitioner Groseclose and the defendant Britt, there seems to be very little to choose from between the defendants. The petitioner would respectfully submit that again the unfettered discretion of the jury was allowed to reach differing results in a life and death situation without adequate guidance and without adequate limits, resulting in a disproportionate sentence for the defendant Groseclose.

Further, the death penalty imposed herein is disproportionate in consideration of the tendered but rejected evidence of Ralph Hadley (B.E. VOL. 25 at 1959, 1960 et seq.) and the tendered but rejected testimony of Hugh W. Stanton, Jr. (B.E. VOL. 25 at 1965 et seq.). The rejected but tendered exhibit 86 (for identification only) clearly sets forth that defendants in first-degree murder cases in Shelby County, Tennessee have been allowed to plead to a capital offense with a recommendation from the District Attorney General of a sentence of ninety-nine (99) years. District Attorney General Hugh W. Stanton, Jr. testified that this memorandum was out of date and rescinded although no written documentation rescinding such

memorandum was ever produced or alluded to. Further, the testimony elicited on cross-examination of District Attorney General Stanton (B.E. VOL. 25 at 1996-2003) demonstrates that the treatment accorded the defendants in this first-degree murder case was substantially different from the treatment accorded all other defendants in all other first-degree murder cases in Shelby County, Tennessee. Other first-degree murder cases in Tennessee illustrate the disproportionate and freakish nature of the death penalty here. State of Tennessee v. Nicholas Tod Sutton, case No. 80-CR-12 is a first-degree murder conviction where the jury imposed only life imprisonment in 1980. Defendant Sutton was convicted of the murder of his grandmother who had adopted him and raised him. The murder was committed with a blunt instrument. The trial judge considered life imprisonment "most appropriate, considering the overwhelming evidence of guilt and the brutal, calculated manner of killing". Report of Trial Judge: Capital Cases; State of Tennessee v. Nicholas Tod Sutton; case No. 80-CR-12.* A proper proportionate review by the Tennessee Supreme Court would have disclosed that the Groseclose and Sutton cases are amazingly identical in terms of the relation to the victim and the characterization of the nature of the crime. Yet Sutton lives and Groseclose is scheduled to die. Under such circumstances, the imposition of the death penalty is "pregnant with discrimination" and permits the death penalty to be "wantonly" and "freakishly" imposed. Furman v. Gerogia, 408 U.S. 238, 257, 310 (1972).

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*Sutton has also been convicted of two murders in North Carolina for which he received life imprisonment to run concurrent with the Tennessee sentence. The Tennessean, May 7, 1981 p. 75.

Finally, it was error of constitutional dimension for the trial court to refuse the sentencing jury the opportunity to hear the testimony of Mr. Hadley, Mr. Stanton, and to fail to review exhibit 86 in terms of proportionate sentencing. In Lockett v. Ohio, 438 U.S. 586, 604 the Supreme Court concluded:

> That the Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor (Court's emphasis), any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

III. THE FAILURE OF THE TENNESSEE DEATH PENALTY ACT TO PROVIDE AN EFFECTIVE SYSTEM OF COMPARATIVE REVIEW OF SENTENCES RENDERS THE DEATH PENALTY ACT UNCONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED TO THE PETITIONER WILLIAM GROSECLOSE.

In order to pass constitutional muster, a death penalty sentencing scheme must eliminate the arbitrary and capricious application of the death sentences, Furman v. Georgia, 408 U.S. 238 309-310 (1972) (Justice Stewart concurring). Such a scheme must provide a reliable system for determining that death is the appropriate punishment in a specific case. Presnell v. Georgia, 439 U.S. 14 (1978) Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

An important component of a reliable, and thus constitutionally acceptable sentencing scheme, is "prompt judicial review of the (sentencing)...decision in a court with statewide jurisdiction (as) a means to promote the evenhanded, rational, and consistent imposition of death sentences under the law". Jurek v. Texas, 428 U.S. 262, 276 (1976). This appellate review is constitutionally necessary to "assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants", Gregg v. Georgia, 428 U.S. 153, 204 (1976) and "to ensure that (death sentences)...are consistent with sentences imposed in similar circumstances", Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Supreme Court noted with approval that the Georgia and Florida schemes provided for comparative review of death sentences to determine "whether the (death) sentence (in each case) is disproportionate compared to those sentences imposed in similar cases", Gregg v. Georgia, supra at 198, and to assure regular and even handed treatment of death sentences, Proffitt v. Florida, supra at at 251. As the Supreme Court noted in Proffitt v. Florida, supra, 428 U.S. at 258-9, the Florida Supreme Court has adopted, without statutory requirement, a comparative proportionality

review similar to that of Georgia. (Opinion of Justices Stewart, Powell and Stevens). An important feature of both systems of appeallate review is the comparison of cases in which death is the sentence with cases wherein life sentences are imposed. See e.g. Gregg v. Georgia, supra at 219, n. 5 (Justice White concurring); See also Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), wherein the court remarked,

> We pride ouselves on a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

This dual appellate function of comparative appellate review of both death and life sentences, coupled with the exercise of their power to vacate inappropriate death sentences, provides a consistent, reliable method by which the judiciary may check the arbitrary and capricious exercise of sentencing power through a review of death sentences, Woodson v. North Carolina, 428 U.S. at 303.

When the Tennessee appellate review system in death cases is measured by the benchmarks of Gregg, Proffitt and Woodson, it falls far short of the constitutional standard. The Tennessee Death Penalty Act does not empower Tennessee courts to exercise comparative proportionate appellate review or to vacate a death sentence in a case where the conviction is fair but where the death sentence imposed, as statutorily authorized, is excessive, arbitrary or disporportionate when compared to thesentence in other cases.

The only special procedure for comparative review of death cases in Tennessee is found in the Rules of the Supreme Court of Tennessee (Rule 47) which provides that the trial judge shall make a report and complete same "in its entirety" in first degree murder cases in which life imprisonment or a sentence of death is imposed (emphasis added). Further, Rule 47

provides that the report shall be submitted to the defendant's attorney for comments concerning factual accuracy and said comments "in response shall be attached to the report" if the defense attorney so desires. In this case, the trial judge's report required by Rule 47 with respect to defendant Groseclose is seriously defective and incomplete. The comments submitted by the defense attorney for defendant Groseclose at trial are omitted from the report (T.R. 236) and are unknown both to the court and to present counsel for defendant Groseclose.*

The Supreme Court rule which has not been complied with in respect to petitioner Groseclose is an attempt to implement 39 T.C.A. section 2406 (c) which allows Tennessee Supreme Court review of the sentence of death for murder in the first degree. Said statutory sections specifically authorizes the Tennessee Supreme Court to promulgate rules as it deems appropriate to establish such procedures "as are necessary to enable it to properly review the death sentence". Petitioner Groseclose submits that this statutory provision and the Supreme Court rule is insufficient to provide for the proportionate sentence review mandated by the Supreme Court of the United States decision and is certainly insufficient as applied in this case due to the serious defects and omissions in the trial judge report.

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*Present counsel for defendant Groseclose had his office staff call the clerk's office of the Tennessee Supreme Court in Jackson and ask for a copy of their copy of the trial judge's report after he realized that the trial judge report in the technical record was deficient, incomplete and lacking. The clerk's office in Jackson informed present counsel's office that they did not have the original report available.

The Supreme Court of Tennessee has adopted a local rule which provides that the trial judge shall complete a form adopted by the Supreme Court in all first degree murder cases in which life imprisonment or a sentence of death is imposed. This report is prepared by the trial judge and submitted to the appellate court and the only possibility for any notice, opportunity to be heard, or contest of the data is the provision in the local rule that the report "shall be submitted to the defendant's counsel for such comments as he desires to make concerning the factual accuracy of the report".

At least two elemental problems arise from this procedure. First, the trial judge report with respect to the petitioner in this case omits the response and reply of the petitioner's trial lawyer (T.R. 236). Second, in any case the petitioner's lawyer is certainly going to feel some amount of pressure in being asked to respond to a trial judge's opinion, comments and conclusions after the trial judge has already reduced them to writing and sent them to the trial lawyer. Although hopefully otherwise, one might reasonably forecast that it is going to be a rare practicing trial lawyer who is going to forcibly disagree with a trial judge under these circumstances and after the judge has already reached his conclusions. Absent a prior hearing on these kind of conclusions, comments and opinions, the practicing trial lawyer confronted with this situation may often refrain from making any comments or may severely limit his comments or response (note that the co-defendant's trial lawyer made no response in this case) (T.R. 227).

Finally, the trial judge's report under the local rule is defective and quite simply wrong in this case. The trial judge states inaccurately that three statutory aggravating circumstances were found. (B.E. VOL. 31 at 2451). How many other reports in other cases are also inaccurate? No one knows but a valid proportionate review of sentence relies upon these reports.

Courts must "do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience". Estelle v. Williams, 425 U.S. 505 (1976). A procedure which denies constitutional principles and results in these kind of errors should not be sanctioned - especially where life itself is at stake.

IV. FAILURE TO TRANSCRIBE THE ARGUMENT OF COUNSEL TO THE JURY AND TO PROVIDE THEM TO THE APPELLATE COURT DEPRIVES PETITIONER GROSECLOSE OF DUE PROCESS OF LAW AND VIOLATES GRIFFIN V. ILLINOIS.

In Gardner v. Florida, 430 U.S. 349, 361 (1977), the Supreme Court of the United States ruled that;

> It is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in ever case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia.

Unfortunately in this case, the arguments made to the jury are omitted from the trial record, bill of exceptions and transcript (B.E. VOL. 11 at 1295-1296; B.E. VOL. 22 at 1618; B.E. VOL. 23 at 1636; B.E. VOL. 28 at 2389-2391 and B.E. VOL. 28 at 2395). Where, as here, the opening and closing arguments made to the jury are not transcribed, it is, by definition, impossible for the reviewing court to analyze the considerations which "motivated the death sentence".

The constitutional error here is, if anything, more serious than that which lead to reversal in Gardner. There, what was missing from the record on appeal was a "portion" of a confidential pre-sentence investigation report; the trial judge's findings did not indicate there was anything in it of "special importance". Gardner at 353.

Arguments to juries of lay persons are surely as important. Cf. Griffin v. California, 380 U.S. 609 (1965); Berger v. United States, 295 U.S. 78, 88 (1935).

The rules of law in this jurisdiction requiring that the complete record be reviewed on appeal are not possible under these circumstances and certainly it is not possible for there to be an independent proportionate review of sentencing when there can be no basis to determine if there was an appeal or influence to the passion or prejudice of the jury. The omission of the prosecutor's arguments to the jury make this kind of review futile.

Even where the penalty imposed was only two hundred fifty dollars ($250), the Supreme Court of the United States ruled that relevant portions of the record, including the prosecutor's arguments should be provided to indigents. Mayer v. City of Chicago, 404 U.S. 189 (1971). Surely, with life in the balance, a state's death penalty scheme should insure that a full record - including each part that may have "motivated a death sentence" (Gardner, 430 U.S. at 361) is available for review.

In Gardner, 430 U.S. at 361, the Court held that failure of defense counsel to request access to the confidential portion of the report "cannot justify" submission of a record to the reviewing court less complete than that available to the sentencing authority. Accordingly, it makes no difference whether there is specific request for transcription of the argument or not, in order for a death penalty scheme to meet constitutionally mandated standards the complete record must be available for review on appeal. Arguments by counsel to the jury have constitutional status. Herring v. New York, 422 U.S. 855 (1975).

At page 10 of the slip opinion, the Tennessee court rejects the argument of petitioner concerning the failure of the trial court to transcribe the closing arguments of the prosecutor and to make them a part of this record. The Tennessee court correctly notes that counsel representing petitioner were not present at the trial and that it was trial counsel who approved the transcript of the record on appeal and "must be deemed to have approved its abridgement". Petitioner respectfully complains that he asked for the transcription in his brief as well as specifically filing a motion with the Tennessee Supreme Court on December 6, 1979, for the transcription of the closing argument so as to have it considered. A man's life should not be taken by the state on the basis of a record which is incomplete, especially where

efforts have been made in good faith to obtain additional information from the trial attorney with a decided lack of success.

Finally, petitioner would note that the state's "Motion to Include Omitted Material" in the record which was filed in this case on December 14, 1979 was routinely granted by the Tennessee court on December 18, 1979. That request was different only in the sense that the "omitted material" requested by the state did not have to be transcribed. Petitioner's incarceration and lack of ability to pay for the transcription should not make a difference. See, Griffin v. Illinois, 351 U.S. 12 (1956).

V. THE CONVICTION AND SENTENCE OF DEFENDANT GROSECLOSE VIOLATES THE DUE PROCESS AND THE EQUAL PROTECTION GUARANTIES IN THAT VENIREMEN WERE IMPROPERLY EXCLUDED UNDER WITHERSPOON v. ILLINOIS AND ADAMS V. TEXAS.

During the voir dire in this case, the prosecution consistently inquired of the potential jurors and veniremen whether or not they supported or opposed the death penalty. Only after the prosecution asked these questions did the court then, sometimes, inquire on its own under Witherspoon v. Illinois, 391 U.S. 519 (1968) and under Beaver v. State, 475 S.W.2d 557 (1971), as to whether or not the venieremen were subject to exclusion for cause. After this procedure, the trial judge excluded veniremen Porter, Ingram, Kail, Kaiser, Hawks, Flynn, Banks, Miller, Sanders, Jones, Ogle, Smith, Jackson, Rose, Campbell, Strauss, and Meals on the grounds that they had reservations about the imposition of the death penalty (B.E. VOLS. 3-11-26, 56, 58, 296, 297, 312-316, 378-380, 429-431, 630, 723-724, 748, 757, 1005, 1016, 1046, 1119, 1199, 1206, 1281). All of this practice occurred over objection by the defendants. (B.E. VOL. 3-11 at 20-22, 313, 758 and 1005).

Witherspoon v. Illinois, 391 U.S. 519 (1968) held that the death penalty could not be imposed and carried out where the jury that recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious scruples against its imposition. See also, Adams v. Texas, 448 U.S. 38 (1980).

Further, not even a single veniremen may be excluded for cause under these grounds unless it is first found that the veniremen are irrevocably committed before trial is begun to vote against the death penalty regardless of the facts and circumstances that may emerge during the course of the proceedings. In Davis v. Georgia, 429 U.S. 122 (1967) the Supreme Court of the United States in a per curiam decision reversed a

Georgia conviction where only one prospective juror had been excluded in violation of the Witherspoon standard.

In this case at least one prospective juror was excluded in violation of the Witherspoon standards. Although counsel would question whether or not several of the prospective jurors listed above were not in fact excluded in violation of the Witherspoon standards, the most striking example concerns Juror Rose:

> MR. MILLER: ...Now, do you have any moral or religious compunction whatsoever, sir, against the death penalty per se?
>
> JUROR (ROSE): I guess I could consider it, but as far as to pinning down the verdict to have someone electrocuted or punished by death, I don't know about that. (emphasis added)
>
> MR. MILLER: You have real reservations as to your ability to follow a law charged to you?
>
> JUROR: To the full extent.
>
> MR. MILLER: In other words, you could consider from one day to life but you could never consider the imposition or the giving of the maximum punishment - to wit, death, in a criminal homicide?
>
> JUROR: Well, I think it would be very difficult, I have never - - -
>
> MR. MILLER: No. I don't think you ever have been asked to do it before. What I'm asking you is, and your're the judge of that and you know what your mind says, you know what your heart says, let me phrase the questions to you this way: Are you at this time so irrevocably committed before this trial ever begins that you would vote against the penalty of death regardless of the facts, regardless of the circumstances that might emerge in the course of this trial?
>
> JUROR: I don't think I'd ever vote for a death sentence.
>
> MR. MILLER: You would never do that sir?
>
> JUROR: No, sir.
>
> MR. MILLER: Under no circumstances could you ever consider the imposition of death for punishment in the case of criminal homicide?
>
> JUROR: I doubt that.

MR. MILLER: You do not feel that you could ever consider that under any circumstances? And the word "consider" it means more than just as a passing phrase. "Consider", means seriously consider the imposition of it, not to be advised or aware of the existence of the phrase, but the considering of the imposition of it. Could you do that, sir?

JUROR: I don't think so.

MR. MILLER: Under no circumstances could you ever consider the imposition of death for punishment in a criminal homicide?

JUROR: (share of nead - negatively)

MR. MILLER: You'r shaking your head negatively. We're trying to---we have to record this---

JUROR: No.

MR. MILLER: Anything that's being said. Thank you.

MR. ADAMS: Mr. Rose, as I understand it, what you're saying is that you have definite problems with the death penalty. Is that correct?

JUROR: Yes, sir.

MR. ADAMS: You'd have definite problems with the death penalty. Is that correct?

JUROR: Yes.

MR. ADAMS: All right. But you are not saying that you cannot follow the law? What you're saying is quite simply is that you would have difficulty in returning a sentence of death and you do not think that you can return a sentence of death? You are not saying that you automatically will not. Is that correct?

JUROR: That's correct.

MR. ADAMS: Thank you. No further questions.

THE COURT: Mr. Rose, I'll ask you, Mr. Rose, as a juror in this case you have reported to this court that you have found the defendant and/or either of them guilty of murder in the first degree beyond a reasonable doubt, and I'll ask you this question: Should the evidence prove the statutory aggravating circumstance or circumstances as shown by the state beyond a reasonable doubt and you find there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances, could you consider the imposition of the death penalty?

JUROR: I don't think so.

THE COURT: You don't think so? I'm going to have to have a little more positive answer than that. You have general reservations against the death penalty. Is that correct?

JUROR: Right.

THE COURT: And as the General stated, it is the law in this state passed by the General Assembly that upon a conviction for the offense of murder in the first degree based on aggravating circumstances and there are no mitigating circumstances that substantially outweigh those aggravating circumstances, the jury can consider the imposition of the death penalty. That is the law. It also could consider the imposition of life imprisonment. You understand that?

JUROR: Yes, sir.

THE COURT: Now, can you consider the imposition of the death penalty as part of that law?

JUROR: No. I don't think so.

THE COURT: Mr. Rose, as a juror are you so fixed in your opinion that you would not be willing to consider all the penalties provided by law and are so irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of this trial?

JUROR: I don't feel that under any circumstances I could vote for the death penalty.

THE COURT: There are no circumstances known to mankind or the law on which you could vote to apply the death penalty?

JUROR: No.

THE COURT: Are you so fixed in your opinion that you would automatically vote against the imposition of the death penalty without regard to any evidence that might be developed in the trial before you?

JUROR: I don't see how any evidence could be presented to make me vote for the death penalty.

THE COURT: Thank you, Mr. Rose, I'll honor the challenge.

MR. ADAMS: Would the Court note my exception under Taylor, Duncan and the other series of cases? B.E. VOL. 10 at 1114-1119.

Under the above facts and circumstances, the defendant Groseclose would submit that the state has failed to show an irrevocable commitment before trial has begun to vote against the death penalty regardless. Davis v. Georgia, 429 U.S. 122 (1967).

VI. THE CONVICTION AND THE DEATH PENALTY SHOULD BE REVERSED FOR INFRINGEMENT ON THE PRESUMPTION OF INNOCENCE AND DENIAL OF THE RIGHT TO A FAIR TRIAL BY THE JURY VIEWING THE PETITIONER IN HANDCUFFS.

Many courts have determined that an accused should not be compelled to go to trial or appear before a jury in prison or jail attire because of the possible impairment of the presumption of innocence which is so basic to the adversary system. Estelle v. Williams, 425 U.S. 505 (1976); Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973); Hernandez v. Beto, 443 F.2d 634 (5th Cir.), cert. denied, 404 U.S. 897 (1971); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); and other cases cited in Estelle v. Williams. Guilt must be established by competent probative evidence and beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979)(S. Ct. June 28, 1979); In re Winship, 397 U.S. 358 (1970). The right to a fair trial is a fundamental liberty secured by due process, Drope v. Missouri, 420 U.S. 162 (1975) including the presumption of innocence. Coffin v. United States, 156 U.S. 432 (1895).

In this case, the defendants including the petitioner Groseclose were shackled in front of the jury and were bound by handcuffs in the presence of the jury (B.E. VOL. 7-695-696; 808-809). The Supreme Court has expressly recognized that "the sight of shackles...might have a significant effect on the jury's feelings about the defendant...." Illinois v. Allen, 397 U.S. 337, 344 (1970). In Illinois v. Allen, the court upheld the practice of shackles and gags because of an express finding that it was necessary to control a "contumacious" defendant. There was no such finding in this case and no reason ever expressed in the record or at anytime during the trial proceedings to show that petitioner Groseclose was disruptive or otherwise worthy of being handcuffed in the presence of the jury. A timely objection was made to this practice (B.E. VOL. 7-695-696).

VII. THE PETITIONER'S RIGHT TO CONFRONTATION AND CROSS EXAMINATION WAS DENIED BY THE TESTIMONY OF DETECTIVE KENNETH EAST WITH RESPECT TO THE CONFESSION OF CO-DEFENDANT BRITT.

Detective Kenneth East testified as to the circumstances of the confession to the murder made by the co-defendant Phillip Michael Britt (B.E. VOL. 21 at 1177 et seq.). After the court ruled that Mr. Britt's confession was admissible, the court redacted any and all references in Britt's confession to the co-defendant Rickman and the co-defendant Groseclose. There was then an extensive discussion between counsel and the court in the presence of Detective East to the effect that there would be no references during the testimony of Detective East to either the co-defendant Groseclose or the co-defendant Rickman as required under Bruton v. United States, 391 U.S. 124 (1968).

Then in the presence of the jury, the following testimony irrevocably prejudiced the defendant Groseclose:

> Q: Tell us what he (Britt) said at that time.
>
> A: He stated that he had become involved approximately four weeks ago when he was approached by Bill Groseclose about having Debbie Groseclose killed. He stated that-- (B.E. VOL. 21 at 1388).

Immediate objection was made under Bruton v. United States, 391 U.S. 123 (1968); White v. State, (Tenn. Crim. App. 1973) (1973). The trial judge agreed with these objections, of course, but the damage was already done. The trial judge then gave a cautionary instruction but, of course, this kind of cautionary instruction was specifically rejected in the Bruton case. At that point the defendant made a motion for mistrial and the petitioner now respectfully submits that the denial of the motion for mistrial was in error.

VIII. THE JURY INSTRUCTIONS ARE FLATLY INCONSISTENT WITH RECENT RULINGS AS TO WHEN A DEATH SENTENCE MAY CONSTITUTIONALLY BE IMPOSED.

It is "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations". "In death cases", moreover, doubts about the clarity of instructions should be "resolved in favor of the accused". Andres v. United States, 333 U.S. 740, 752 (1948). See also Calton v. Utah, 130 U.S. 83, 87 (1889) ("fundamental" in cases involving death that instructions be clear and explicit).

Although criminal defendants are entitled to instructions clear to laypersons as well as legal scholars, Taylor v. Kentucky, 436 U.S. 478, 484 (1978), it is particularly true in death cases that instructions should be (as Mr. Justice Frankfurter put it) in clear "simple, colloquial English", and (as then Chief Judge Cardozo wrote) given "directly and not in a mystifying cloud of words". Andres v. United States, 333 U.S. at 766; McGautha v. California, 402 U.S. 183, 199 (1971) quoting Law and Literature (1931).

The instructions below do not pass those general tests. More specifically, they depart in three separate but re-enforcing respects from the very elements of the jury instructions in the Gregg case which were held to be constitutional.

A. The Jury was not Told Its Decision on Life or Death Must Include Focus on the Particular Characteristics of the Defendant.

The instructions leading to the death verdict against two of the three defendants say not one word about the need to weigh each defendant's particular characteristics, as well as the specific circumstances of the crime. Thus, they conflict with:

(i) Gregg and the other 1976 decisions holding that certain death penalty statutes can, if properly administered to focus on the individual defendants, meet the requirements of the Constitution. In Gregg, the Supreme Court emphasized the constitutional obligation to focus specifically on the defendant in at least six places in the plurality opinion. 428 U.S. at 189-90, 190, 192, 197, 199 and 206. In Jurek v. Texas, 428 U.S. 262 (1976) the Supreme Court upheld the statute because it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death". 428 U.S. at 274. In Proffitt v. Florida, 428 U.S. 242 (1976), the statute was held constitutional in part because the sentencing authority must "focus" on "the circumstances of each individual homicide and individual defendant". 428 U.S. at 258.

(ii) Woodson v. North Carolina, 428 U.S. 280 (1976) and the other 1976 decisions holding mandatory death penalty statutes unconstitutional because they exclude consideration of mitigating factors and the circumstances of the defendant. See also Roberts v. Louisiana, 428 U.S. 325 (1976).

(iii) Lockett v. Ohio, 98 S. Ct. 2954 (1978) which held that in death cases the sentencing authority must be given a "full opportunity" to consider "mitigating circumstances", including "any aspect of the defendant's character and record".

B. The Term "Mitigating was not Defined for the Jury and Concrete Examples of Mitigating Circumstances were not Provided.

In the instructions to the jury, the trial judge did not explain or define the term mitigating circumstances other than by adoption of special request for jury instruction number 1 and that special request did not define or explain the term but only stated that the jury could consider evidence that tended to favor the defendant. Such an inadequate instruction gives no "direction" or "guidance" at all and certainly falls far short of the careful, adequate and suitable guidelines and direction that is constitutionally required.

Notice specifically in Gregg v. Georgia, a much more complete definition of "mitigating" was given to the jury and approved on appeal. Gregg v. Georgia, 428 U.S. 153 (record in the Trial Transcript at 480) (1976).

In addition, the Supreme Court's decision - and a fair reading of both the State Constitution and the Federal Constitution - called for more than a definition of "mitigating". They require that particular mitigating factors, relevant in light of the record, be called to the jury's specific attention as examples of what they could weigh against the aggravating circumstances which the court called to the jury's attention.

C. The Jury Also was not Informed that it Should Weigh "Mitigating" Circumstances Against Aggravating Circumstances.

Apart from not defining the legalism "mitigating" for the jury or providing particularized examples, the jury instructions are also constitutionally deficient in that the jury was not specifically informed that it should weigh mitigating against aggravating circumstances. In contrast, under the Model Penal Code referenced in Gregg, and under the Florida statute approved in Proffitt, the sentencer is specifically informed that it should weigh mitigating against aggravating circumstances, 428 U.S. at 248 - 251, 258. Similarly, in Jurek the question which a jury must answer before imposing the death sentence necessarily requires such balancing. While a particular form of words may not constitutionally be required, surely it is not constitutional to leave the jury totally at sea as it was left here. Further, the judge specifically denied the special jury request number 2 and number 3 which provided for the burden of proof on mitigating circumstances as compared to aggravating circumstances and a presumption as to life imprisonment over the death penalty.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Tennessee.

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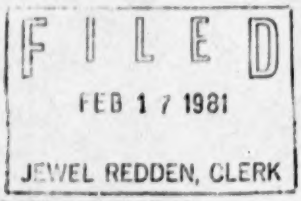
June 12, 1981

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
SITTING AT KNOXVILLE

For Publication

February 17, 1981



STATE OF TENNESSEE,
Plaintiff-Appellee,
vs.
WILLIAM EDWARD GROSECLOSE and RONALD EUGENE RICKMAN,
Defendants-Appellants.

Shelby Criminal
No. 5
Hon. L. T. Lafferty, Judge

For Plaintiff-Appellee:

William M. Leech, Jr.
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For Defendants-Appellants:

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O P I N I O N

AFFIRMED

HARBISON, J.

Appellants William Edward Groseclose and Ronald Eugene Rickman appeal from their convictions of murder in the first degree and a sentence of death pursuant thereto. A codefendant who was tried and convicted with them, Phillip Michael Britt, was sentenced to life imprisonment. His case is not involved in the present appeal.

After careful consideration of the assignments of error made on behalf of appellants and of the entire record, we are of the opinion that the verdict and sentence are sustained by the evidence and that no reversible error was committed at the very lengthy trial out of which these appeals arise.

Appellants were convicted for the murder of Deborah Lee Groseclose on or about June 29, 1977. The victim was the wife of appellant William Edward Groseclose.

Jury selection began in this case on February 13, 1978, and was completed on February 17. After pleas of not guilty by all defendants, trial commenced on February 18, 1978, and was concluded on February 28. The sentencing hearing consumed from March 1 through March 3. None of the defendants testified before the jury at the guilt phase of the hearing. The State presented thirty-nine witnesses during that portion of the trial. The resulting record was voluminous, and there were, of course, some discrepancies and conflicts in the testimony. There was material evidence presented to the jury, however, to support the following statement of the essential facts.

Mr. and Mrs. Groseclose were married in April, 1975. They had been experiencing marital difficulties for some time prior to her death. They had been separated for about two

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weeks, during a part of which Mr. Groseclose visited his mother in Kingsport, Tennessee. Mr. Groseclose was twenty-nine years of age in June 1977; his wife was twenty-four. He had served in the Navy for several years. Prior to his wife's death he had been employed in the Navy Recruiting Service. It was there that he had become acquainted with several of the other persons involved in the homicide.

Mr. Groseclose was discharged from his employment on June 16, 1977, because of serious irregularities in his enlisting of recruits. His wife was employed as a receptionist for a group of physicians. Shortly after their marriage Mr. Groseclose had obtained a substantial amount of insurance on the life of his wife.

For several weeks prior to the actual homicide, Mr. Groseclose planned the death of the victim. His motives may have been apprehension that she was about to sue him for divorce, desire to obtain the life insurance proceeds, or interest in another woman. There is evidence in the record to suggest all of these as possibilities. In all events, he contacted one of his former recruits, Barton Wayne Mount, in an effort to employ someone to murder Mrs. Groseclose. Mount placed him in touch with his codefendant Britt, a nineteen-year-old boy. Britt contacted his former brother-in-law, appellant Rickman. Ultimately, with the knowledge and participation of Britt and Mount, Rickman agreed to perform the act for a specified and negotiated price. Britt was to share in the proceeds. Groseclose also promised to reward Mount thereafter.

Mount was indicted with the other three defendants. His case, however, was severed and he testified for the State

at the trial. His testimony was devastating to all three defendants. Although he was cross-examined at length by counsel for all defendants, his testimony clearly showed that the homicide was committed by Rickman and Britt on behalf of and after being procured by Groseclose.

Also testifying for the State was Pamela Baker Lindsey, who at the time of the homicide was living in an apartment with Rickman and with one Donnie Tatum. Mrs. Lindsey was never indicted in connection with the death of Mrs. Groseclose. In her testimony, she described in detail a meeting between the participants and Mr. Groseclose, as well as the planning and the aftermath of the murder. Shortly after it was committed, she assisted Rickman in shaving his hair, altering his beard, and materially changing his appearance. She and Rickman fled to Oklahoma where Rickman was arrested about one week after the body of Mrs. Groseclose was discovered.

The murder was one of the most atrocious and inhuman conceivable. Although there are different versions and conflicting evidence on the point, it appears that there was a plan for Rickman to accost Mrs. Groseclose on the afternoon of June 28 and to frighten her to the point that she would report the incident to police. She was then to be murdered on the next day, the plan being that suspicion would be diverted from her husband by the previous incident. Whether planned or not, this in fact occurred, and Rickman approached Mrs. Groseclose on the parking lot near the place of her employment. When she would not talk with him, he followed her home in another automobile, greatly alarming her. There

is no question but that she was frightened and that she did report the incident to the police in the evening of June 28, 1977. She also reported it to other persons, including her husband, apparently having no suspicion of his involvement.

According to plan, Mr. Groseclose left his residence early on the morning of June 29, taking his infant son with him. He left the back door to the residence unlocked, although he had previously supplied a key for use by the murderers in the event they had difficulty obtaining access to the house. Rickman and Britt went to the residence at about 5 or 5:30 in the morning and waited in a workshop near the home until Mr. Groseclose left. They then entered the house. Each had sexual relations with Mrs. Groseclose. They then permitted her to bathe and dress, during which process Rickman advised her that there was a "contract" on her life. According to the phrase used by both Britt and Rickman, the terrified woman "plea bargained" with her attackers and offered to try to get money for them. This offer was refused, and Rickman proceeded to strangle Mrs. Groseclose into unconsciousness. Whether Britt participated in this act or not is unclear from the proof. He said that he did not, although at one point he admitted having held the hands of Mrs. Groseclose briefly while she was struggling with Rickman, who had seized her from behind. In all events, apparently still detecting a pulse after the victim had been rendered unconscious, Rickman stabbed her three or four times in the back near the spinal cord. Thinking their victim to be dead, Rickman and Britt then placed her body in the trunk of her automobile and drove the vehicle to a parking lot adjacent to the main Memphis Public Library. During this

trip, Rickman became aware that the victim was not dead, and in a statement later introduced he said that he and Britt could hear her cries for help from the trunk. Britt denied this and said that he could not recall having heard any outcry from the victim.

In all events, the victim was left locked in the trunk of her automobile in the broiling sun from about 9 a.m. on June 29 until her badly decomposed body was discovered therein during the early afternoon of July 4 -- a period of some five days. Medical testimony revealed that the injuries which had been inflicted on Mrs. Groseclose by Rickman would not have been fatal and that she died from the excessive heat in the trunk of the automobile (systemic hyperthermia).

Mr. Groseclose reported his wife missing during the day of June 29 and went through a pretense of searching for her during the next several days. The perpetrators, Britt and Rickman, met with him and told him that their mission had been accomplished. He had withdrawn funds from a bank account on the night of June 28 in order to make a partial payment to Rickman and was to pay the balance when he collected the proceeds of the insurance policies on his wife.

Rickman and Pamela Lindsey had been living in an apartment rented by one Donnie Tatum. Police began an extensive investigation into this homicide after the ghastly discovery of the victim on July 4. They interviewed Tatum and Mount, and the entire scheme came to light. Within a week after the homicide most of the principal participants were in custody. Tatum gave a detailed statement to the police, which was consistent with that later given by Mrs. Lindsey and by Britt and generally consistent with one also

given by Rickman. After a full suppression hearing, the statements of both Britt and Rickman, in redacted form, were admitted into evidence and read to the jury. Later, at the sentencing hearing, their unredacted statements were read in full.

Further discussion of the facts is unnecessary, except as relevant to specific assignments of error. There was overwhelming proof of the guilt of all three of the defendants, and the assignments of error challenging sufficiency of the evidence are overruled.

Also without merit is an assignment challenging the admissibility of two photographs of the body of the victim on the ground of their gruesomeness and prejudicial effect. These were apparently polaroid snapshots, taken at a distance of several feet, and show very little detail, other than the actual location of the body. Their contents do not approach the gruesomeness of the oral testimony given by several eyewitnesses, and they were probative primarily to show the position of the body in the vehicle at the time of its discovery. The photographs were relevant, and their probative value was considerable. We find no error in their admission.

Another issue dealing with the proof pertains to the admission in evidence of a grenade detonator through the testimony of Pamela Lindsey. Mrs. Lindsey testified that this detonator was in the possession of Rickman prior to the homicide. Upon objection by counsel for the defense to the admission of the exhibit, the District Attorney stated that its relevance would become apparent when Donnie Tatum testified as a witness.

Tatum was present at the trial and waited for a considerable time before being called as a witness. When he was called, however, defense counsel objected at the outset to any evidence given by him on the ground that he had been granted immunity by the grand jury and that this fact was not made known to counsel prior to the trial. In the face of this objection, the State agreed not to use Tatum as a witness. His signed statement to the police was later filed for the record, and, like the testimony of Mount, it was extremely detrimental to all three defendants. The exclusion of Tatum as a witness was, therefore, of material benefit to the defense. None of the defendants, however, moved to strike the grenade detonator from the record or the testimony of Mrs. Lindsey pertaining thereto. To the contrary, counsel for defendants cross-examined several prosecution witnesses about the grenade detonator, and it was referred to thereafter on several occasions without objection. The initial objection was never renewed, nor was it mentioned in the motion for new trial after verdict.

It is apparent from an examination of Tatum's statement that had he been permitted to testify, the grenade detonator would have been material, and testimony concerning it would have been detrimental to Rickman. In the statement, Tatum said that when he was first interviewed by the police in his apartment after the homicide Rickman secreted himself in an adjoining closet with the detonator and threatened to destroy himself, Tatum and the investigating officer by activating the detonator if Tatum gave any damaging information to the police. All of this testimony was excluded from consideration by the jury. There was no reversible error in

the original admission of the detonator and certainly no prejudicial error to the defendants as a result of the subsequent trial developments. If any error initially occurred in the admission of the detonator, it was at most harmless and must be deemed waived by failure to renew the objection at an appropriate time. Parenthetically, on the sentencing hearing, Rickman admitted possessing the detonator and demonstrated its potential use to the jurors.

Appellants assign as error testimony by a police officer implicating Groseclose after statements given by Britt and Rickman had been ordered redacted and all references in each to any codefendant deleted.

The statement by the officer was merely an introductory remark, to which objection was immediately made and sustained. Cautionary instructions were given to the jury. The statement came late in the presentation of the State's proof, long after both Mount and Mrs. Lindsey had testified, directly implicating all of the defendants. Under the circumstances, therefore, the statement by the officer was at most a technical error and was merely cumulative and repetitive to much more damaging testimony on the same subject which had already been admitted without objection. The assignment of error is overruled.

Appellants complain of the voir dire examination of the jurors and their qualification with respect to the death penalty. We have examined the record, however, and we do not find that any error was committed by the trial judge in excusing jurors for cause. We further note that appellants did not exhaust their peremptory challenges, and there is no basis for reversal with respect to the

examination of the jurors.

Likewise without merit are assignments complaining of failure of the court reporter to transcribe the final arguments of counsel. Counsel representing appellants on appeal were not present at the trial. Trial counsel, however, fully approved the transcript of the record on appeal and must be deemed to have approved its abridgement. In the absence of supporting affidavits or other evidence that prejudicial or reversible error occurred during the final summations of counsel, we cannot sustain this assignment.

Equally without merit is the complaint that the trial judge failed to complete and to supply a report to the clerk of this Court concerning the defendant Britt. Such a report is required in all cases where the death penalty is submitted to the jury for consideration, whether imposed or not. See Rule 47 of the rules of this Court.

In the present case, reports concerning Groseclose and Rickman were included in the record on appeal, as required by the Rule, but since Britt's case is not involved here, a report concerning him was not included. Such a report was prepared by the trial judge, however, and transmitted to the clerk of this Court under date of April 4, 1978, in compliance with the rule. Accordingly the assignment of error regarding the absence of this report is overruled.

Appellants have assigned errors regarding the jury instructions, but from an examination of them we are of the opinion that the instructions given closely followed the Tennessee statutes which the Court has previously held constitutional. One of the principal complaints made in the brief of appellants was the failure of the trial judge to

define the term "mitigating," but we are of the opinion that this is a word in common usage and certainly not a "legalism" beyond the understanding of ordinary citizens composing a jury panel.

Appellants also complain of some incidents which occurred during the impaneling of the jury, such as contact of prospective jurors with persons who had already been excused from the panel and the viewing by jurors of the appellants in handcuffs. These incidents are referred to very briefly in the transcript; none are documented by affidavits; and we are of the opinion that the trial judge committed no reversible error in respect to any of the matters complained of by appellants in the impaneling of the jurors.

One of the principal assignments of error is the alleged disproportionate sentences given to appellants as contrasted with the sentence of life imprisonment given to their codefendant Britt. We have carefully reviewed the record in this regard, and we are of the opinion that there was material evidence in the record justifying the discretion exercised by the jurors in this regard.

The very essence of the statutory procedure under which the death penalty may be imposed is the requirement that the jurors consider each case separately and individually, and that they consider aggravating and mitigating circumstances in each case. Their decision, of course, is not to be reached in an arbitrary manner, but, on the other hand, the jury is certainly not required to impose the death penalty in every case involving a conviction of murder in the first degree.

The jury found aggravating circumstances against both Groseclose and Rickman which are clearly sustained by

the proof, including the fact that this was a murder for hire and that it was particularly brutal and atrocious. In the case of Rickman, the evidence showed a substantial record of prior criminal activity. No mitigating circumstances were proved on his behalf. Groseclose had no prior criminal record, but this was the only mitigating factor established in his case. Witnesses whom he called, supposedly to attest to his general character and reputation, showed only that he had been well liked in his work at the naval base in Memphis. These witnesses, however, further said that appellant Groseclose had become unreliable and undependable in his work, that his general performance was unsatisfactory, and that he was discharged from his employment for that reason.

In his report to this Court summarizing the cases, the trial judge made the following comment with respect to appellant Rickman:

> "Due to the facts that developed in this lawsuit the defendant's guilt was without question. The manner of the death of the victim in this case was the second worst manner this Court has seen in 15 years experience in criminal cases. This Court has no quarrel with the jury's decision as to the punishment for this defendant.

Earlier in the report, in describing the extent of harm or torture to the victim, the trial judge said:

> "The manner of death was atrocious, after raping and stabbing the victim, she was choked unconscious, placed in the trunk of a car on 6/29/77, and died due to systematic hypothermia[1] (literally cooking to death). Body was found 7/4/77."

As to appellant Groseclose, the trial judge gave the same description of the manner of death and made this comment:

> "There is no doubt in this Court's opinion that the defendant intended to kill his wife as

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[1]Apparently a typographical error for "systemic hyperthermia."

> shown by the proof. This defendant willfully, maliciously and intentionally set in motion the plan whereby his wife met a most atrocious death. The jury was justified in its decision as to the punishment for this defendant, although he was not physically present."

We find that the record fully supports these conclusions by the trial judge.

On the other hand, while Britt legally was as fully implicated in the homicide as was Rickman, there is evidence which, if accepted by the trier of fact, would establish that he did not physically engage either in the strangulation or the stabbing of the victim. He was only nineteen years of age with no prior criminal record. There was substantial evidence, both lay and expert, that he was subject to domination and influence by the older, more mature and more hardened criminal, Rickman. One of the statutory mitigating circumstances in this state is that the act was committed under duress or under the "substantial domination of another person." T.C.A. § 39-2404.

Further, as noted by the trial judge in his report, throughout the trial, and particularly at the sentencing hearing, Britt, unlike his codefendants, manifested remorse and regret over the incident. He testified that his guilty knowledge weighed heavily upon his conscience, and that when he was taken into custody on July 10 he freely and voluntarily disclosed all of the circumstances surrounding the death of the victim, including his own participation therein. The jury saw and observed his manner and demeanor in testifying, as contrasted to that of the appellants, both of whom, throughout most of the trial, denied any implication whatever. A trier of fact could reasonably accept the testimony which Britt

offered. Further, there was expert evidence offered on his behalf that he is subject to a program of rehabilitation and could benefit therefrom, but no such evidence was offered by either of the appellants.

Britt testified that he had not planned to be present at the time of the homicide and that he only accompanied Rickman upon the latter's orders and directions. When Rickman first testified at the sentencing hearing, he denied any participation whatever in the events of June 29, 1977. Later, however, at the conclusion of the sentencing hearing, Rickman again took the stand. This time he testified that the written statement which he had earlier given investigating police was substantially correct and that he did in fact kill the victim. On this occasion, he confirmed Britt's testimony that the latter was present only on the orders of Rickman, to assist in the furnishing of transportation.[2] The jury was, of course, entitled to accept or reject all or part of Rickman's contradictory testimony, but at least at this point in the trial he did attempt to minimize the role which Britt had played.

In his report to this Court, the trial judge stated that there was evidence from which the jury could have found several mitigating circumstances, including absence of any prior criminal record, duress or domination by another person, youth of the accused and contrition and remorse. He commented upon the sentence of the jury as follows:

> This trial jury under the evidence in this lawsuit could have easily found death as punishment. The jury evidently took into consideration the defendant's age (19) and his domination or

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[2]On this occasion Rickman testified that he had known Mrs. Groseclose previously and that she and others had supplied him with drugs for use in illegal narcotics sales. He also claimed that she had had an illicit love affair with him. This testimony was strongly challenged on cross-examination and was never corroborated by any other evidence.

influence by codefendant, Ronald E. Rickman. This trial Court has no quarrel with the jury's decision as to this defendant."

We are of the opinion that the jury did not act arbitrarily or capriciously in imposing the death penalty on appellants while sentencing Britt to life imprisonment. The case of each of the accused persons had to be considered separately and on its own individual merits. Each of the defending parties was allowed very wide discretion in offering evidence at the sentencing hearing. The testimony ranged over a wide area, including philosophical and religious topics, as well as the personal history of each defendant. The only limitation which the trial judge imposed involved a detailed examination of the District Attorney and his staff by counsel for appellants, out of the presence of the jury, with respect to the refusal of the District Attorney to engage in plea bargaining in these cases and as to his policies in the handling of similar cases. No issue for jury consideration was developed at this portion of the sentencing hearing, in our opinion, but each appellant was given almost unlimited freedom to introduce any other mitigating evidence which he desired.

The remaining assignments of error by appellants challenge the constitutionality of the Tennessee death penalty statute in a number of respects. These issues have been previously considered and rejected by this Court in other cases. For example, appellants contend that the statutes are unconstitutional in that they do not require notice to the accused of the particular aggravating circumstances upon which the State will rely at trial. Both in State v. Berry, 592 S.W.2d 553 (Tenn. 1980), and in Houston v. State, 593 S.W.2d 267 (Tenn.

1980,[3] this contention was considered and found to be without merit. In Houston, supra, most of the remaining contentions now made with respect to the alleged vagueness of the statutes, mandatory imposition of the death penalty, double jeopardy and use of hearsay evidence at the sentencing hearing were considered and rejected. Likewise found to be without merit was the contention that the statutes limit the mitigating circumstances which the jurors may consider or deprive them of any other accurate sentencing information. See also Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979).

In the present case the appellants challenge the efficacy of Rule 47 of this Court to afford a meaningful or realistic comparison of cases arising under the death penalty statutes so as to prevent the arbitrary or capricious imposition of that penalty. We are of the opinion that the procedures prescribed in Rule 47 are sufficient. By any standard of comparison, where the public policy of a jurisdiction, as reflected in its statutes, authorizes the death penalty, the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants.

All assignments of error are overruled. The judgment of conviction in each case and the sentence imposed pursuant thereto are affirmed. The sentences will be carried out as provided by law on August 1, 1981, unless otherwise stayed or modified by appropriate authority. Costs are taxed to appellants.

William J. Harbison

William J. Harbison, Justice

Fones & Cooper, JJ., concur.
Brock, C.J., dissents.

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[3]Cert. denied, 101 S. Ct. 251 (1980).

APPENDIX B

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

February 17, 1981

FILED

FEB 17 1981

JEWEL REDDEN, CLERK

STATE OF TENNESSEE,

Plaintiff-Appellee,

v.

WILLIAM EDWARD GROSECLOSE and RONALD EUGENE RICKMAN,

Defendants-Appellants.

Shelby Criminal No. 5

Hon. L. T. Lafferty, Judge

OPINION
CONCURRING AND DISSENTING

I concur in affirming the conviction of the defendants for first degree murder. I dissent, however, from the sentence of death, for the reasons expressed in State v. Jeffrey Stuart Dicks, released February 2, 1981.

Ray L. Brock, Jr.
BROCK, J.

(State v. Dicks attached)

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED
FEB 2 1981
JOHN A. PARKER, Clerk
By_____

STATE OF TENNESSEE, Plaintiff-Appellee, V. JEFFREY STUART DICKS, Defendant-Appellant.	I I I I I I I I I I I I I	Greene Criminal Hon. Edgar P. Calhoun Sitting By Interchange Docket Number 12

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D I S S E N T I N G O P I N I O N

I concur in the affirmance of Dicks' guilt of first degree murder, but I dissent from the sentence of death for the reasons herein set out.

I

Article I, Section 16, of the Constitution of Tennessee provides:

> "That excessive bail shall not be required, nor excessiye fines imposed, nor cruel and unusual punishments inflicted."

The Eighth Amendment to the Constitution of the United States, applied to the states through the Fourteenth Amendment, contains a like prohibition.

Although this Court has never declared a statute to be void because it is in violation of the cruel and unusual punishment prohibition of Article I, Section 16, of the Tennessee Constitution, it long ago declared its authority and power to do so. In Brinkley v. State, 125 Tenn. 371, 143 S.W. 1120 (1911), the Court stated:

> "However, we think that the profession generally understands, and the clear weight of modern authority is, that the courts have such power under section 16 of the Bill of Rights, and in a proper case presenting the question, it would be their undoubted duty to do so."
>
> 125 Tenn. at 382-83, 143 S.W.2d at 1122.

Moreover, we are not bound to construe a provision of our own state constitution in the same way and to the same effect as the United States Supreme Court has construed a like provision of the federal constitution. A majority of this Court expressly so held in Miller v. State, Tenn., 584 S.W.2d 758 (1979). In the Miller case we refused to construe the ex post facto provisions of Article I, Section

11, of the Constitution of Tennessee so as to permit the application to the defendant of a death penalty statute which had been enacted after the commission of the homicide in question, although the Supreme Court of the United States in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), had held that the ex post facto provision of Article I, Section 10, of the Constitution of the United States did not prevent the State of Florida from applying a Florida death penalty statute in similar circumstances. Speaking for the Court, Mr. Chief Justice Henry stated:

> "However, as to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we might not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution. It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions. (Citations omitted.) Thus, although state courts cannot interpret their state constitution so as to restrict the protections afforded by the federal constitution, as interpreted by the United States Supreme Court, they may expand protections on the basis of a textually identical state constitutional provision.
>
> * * *
>
> "We do not accept the holding of Dobbert as a matter of Tennessee constitutional law."
>
> 584 S.W.2d at 760.

To the same effect see State v. Kaluna, Hawaii, 520 P.2d 51 (1974).

II

I concurred in the majority opinion in Cozzolino v. State, Tenn., 584 S.W.2d 765 (1979), which contains the following statement:

> "Without detailing the precise scope of the protection afforded by that clause [cruel and unusual punishments clause of Article I, Section 16, of the Constitution of Tennessee], we hold that it places no greater restriction on the punishments that may be imposed by this state than does the federal constitution."
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> 584 S.W.2d at 767.

In so doing I erred. But, I think it better to confess and correct that error than to perpetuate it.[1] I am unable to agree that the protection provided by the cruel and unusual punishments clause of Article I, Section 16, of the Tennessee Constitution must be reduced to the uncertainties and contradictions contained in the decisions of the United States Supreme Court involving the death penalty over the past ten years.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), the Court struck down the death penalty as then applied on the ground that its imposition was capricious and arbitrary and, thus, unconstitutional. Nine separate opinions accompanied the 5 to 4 decision. Justices Brennan and Marshall found the death penalty to be cruel and unusual under all circumstances and, thus, unconstitutional. Justices Douglas, Stewart and White condemned the death penalty because it had been applied discriminatorily, "wantonly, . . . freakishly, . . . and so infrequently that it did not serve any public purpose . . . ." Stewart, J., at 408 U.S. 310.

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[1] Cozzolino was granted a new sentencing hearing which resulted in his receiving a life imprisonment sentence. I did not participate in the decision of Houston v. State, Tenn., ____ S.W.2d ____ (1980).

Chief Justice Burger and Justices Blackmun, Powell and Rehnquist dissented.

Four years later, the Court held for the first time that a state could inflict the death penalty without violating the Eighth Amendment's prohibition of cruel and unusual punishments. Gregg v. Georgia, 428 U.S. 153 (1976). A controlling plurality of the justices approved death penalty statutes that, in their view, narrowed the class of crimes for which the death penalty would be imposed and guided the discretion of the sentencer.

Since Gregg v. Georgia, supra, however, just how much discretion the jury should be allowed in imposing death as a punishment has been a constant source of difficulty for the legislatures and the courts. On the one hand, notions of equal protection, due process, and fundamental fairness indicate that juries across the country should impose similar punishments for comparable crimes committed by comparable criminals. On the other hand, notions of compassion, individual justice and fairness indicate that it is "[h]ighly relevant - if not essential" that the sentencer consider particular circumstances such as the background and personal characteristic of each defendant. Lockett v. Ohio, 438 U.S. 586 (1978) [opinion of Burger, C.J., quoting Williams v. New York, 337 U.S. 241, 247 (1949)]. In my opinion it is impossible to reconcile this tension between consistency (sought to be achieved by guiding the jury's discretion) and individual justice (attempted by allowing the jury to exercise discretion). The states' failure to achieve this delicate balance has forced the Supreme Court to overturn a number of death penalty sentences. See, e.g., Woodson v. North Carolina,

428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (statutes providing for mandatory death sentence for certain offenses) (too little discretion); Roberts v. Louisiana, 428 U.S. 325 (1976) (statutes providing for mandatory death sentence for certain offenses and for submission of lesser-included offenses not supported by the evidence) (too little discretion in specifying sentence; too much caprice in specifying crime); Lockett v. Ohio, supra (statute listing exclusive mitigating circumstances) (too little discretion); Godfrey v. Georgia, _____ U.S. _____, 100 S.Ct. 1759 (1980) (unconstitutional application of statute listing aggravating circumstances) (too much discretion); Beck v. Alabama, _____ U.S. _____, 100 S.Ct. 2382 (1980) (statute precluding consideration of lesser-included offenses supported by the evidence) (too little discretion). The difficulty in striking a coherent balance between discretion and statutory control was pointed out in Lockett v. Ohio, supra, by Mr. Justice White, who chided the plurality for its "about face" since Furman. 438 U.S. at 622 (White, J., concurring in part, dissenting in part, and concurring in the judgment). And, Chief Justice Burger, reviewing the Court's recent death penalty cases, conceded that "The signals from this Court have not, however, always been easy to decipher." Id. at 602 (opinion of Burger, C.J.).

I am not able to decipher "the signals" of those decisions and, thus, make no prediction whether the current Tennessee death penalty statute, or the infliction of the death penalty in this particular case, can stand muster under the Eighth Amendment as it might be construed by a majority of the Supreme Court.

Our General Assembly has made a good faith,

conscientious effort to write a death penalty statute that complies with recent decisions of the Supreme Court. However, I have reached the settled conclusion that the death penalty violates Article I, Section 16, of the Constitution of Tennessee because it is a "cruel and unusual punishment."

In an opinion by Chief Justice Hennessey, the Supreme Judicial Court of Massachusetts in District Attorney For the Suffolk District v. James Watson, _____ Mass. _____, 411 N.E.2d 1274 (1980), has concluded that the death penalty statute of that state, equivalent to the Tennessee statute in every material respect, is invalid as a cruel or unusual punishment prohibited by Article 26 of Declaration of Rights of the Constitution of Massachusetts because: "(1) the death penalty is unacceptably cruel under contemporary standards of decency, and (2) the death penalty is administered with unconstitutional arbitrariness and discrimination." Id. at 1275. I find the reasoning and conclusions of that opinion to be irrefutable. I believe it will stand as a landmark decision and be followed by the courts of many other jurisdictions in the years to come. I shall refer to it and quote from it extensively in this opinion.

THE DEATH PENALTY IS A CRUEL AND UNUSUAL PUNISHMENT

A. "Cruel and unusual" - the standard.

It must be conceded, of course, that at the time Article I, Section 16, of our state constitution was adopted in 1870 it was not considered to prohibit capital punishment. Capital punishment was employed before its adoption and has been employed since its adoption. But,

as noted by the Supreme Court in Weems v. United States, 217 U.S. 349, 373 (1910), a constitutional provision "is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider applications than the mischief which gave it birth." As noted by the Supreme Court of California in People v. Anderson, 6 Cal.3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied 406 U.S. 958 (1972):

> "The framers of our Constitution like those who drafted the Bill of Rights, anticipated that interpretation of the cruel and unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted."
>
> 493 P.2d at 893.

See also, Trop v. Dulles, 356 U.S. 86, 101 (1958), in which the Supreme Court observed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Therefore, when the validity of the death penalty is drawn in question, judges cannot avoid the task of determining whether the death penalty continues to conform to the "standards of

the age."[2] If it falls below that standard, it is the duty of the court to declare it to be invalid. Ever since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) that has been the way such questions have been decided in this country. The courts have no more authority to defer to the judgment of the legislature in determining what is a "cruel and unusual" punishment than to defer to that branch of government for a determination of what is "due" process of law or what is an "unreasonable" search and seizure. In each of these instances, the determination is a judicial one which, in our jurisprudence, resides with the courts and cannot be avoided.

What considerations enter into a determination whether the death penalty does or does not comply with contemporary moral standards? Clearly, there is not unanimity of public opinion either favoring or opposing the death penalty. However, public opinion, although relevant, is not conclusive of the issue.

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[2] "If we look back at history, we find that capital punishment was once thought to be the only just punishment for thieves, adulteresses, heretics, and forgers. The sentiment of justice went so far as to require the robber to have his bones broken and his still living body left to expire tied to the spokes of a wheel fixed on a pole on a scaffold. We now find such punishments revolting; we use the death penalty only to remove life, and we perform the operation in the seclusion of a prison chamber. The point is that justice is a relative concept that changes with the times. A sense of justice must exist among all people to regulate their living together. This is an immutable requirement of social life, but what justice means is not immutable."

Sellin, "The Inevitable End of Capital Punishment," in Capital Punishment 241-42 (T. Sellin ed. 1967).

> "If the judicial conclusion that a punishment is 'cruel and unusual' 'depend[ed] upon virtually unanimous condemnation of the penalty at issue,' then, '[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.' We know that the Framers did not envision 'so narrow a role for this basic guaranty of human rights.'"
>
> Furman v. Georgia, supra at 268 (1972) (Brennan, J., concurring), quoting from Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1782 (1970).

The Supreme Judicial Court of Massachusetts has correctly pointed out ". . . that what our society does in actuality is a much more compelling indicator of the acceptability of the death penalty than the responses citizens may give upon questioning." Watson, supra, at 1282.

The last person executed in Tennessee was William Tines, on November 7, 1960. There was one execution in 1959 (Thomas Rutledge). There were none in 1958, two in 1957, and none in 1956. There were four in 1955. There were none in 1954, 1953, 1952, or 1951. No executions were carried out in the four recent administrations of Governor Frank Clement, Governor Buford Ellington, Governor Winfield Dunn and Governor Ray Blanton. Reciting a lack of executions in Massachusetts since 1948, Chief Justice Hennessey of the Massachusetts Supreme Judicial Court in District Attorney for the Suffolk District v. Watson, supra, made this statement:

> "The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable."
>
> Id. at 1282.

The above recited experience in Tennessee leads me to a similar conclusion.

I now point out certain aspects of the death penalty which, in my view, render it "cruel and unusual."

B. Finality of the penalty.

The utter finality of the death penalty may cruelly frustrate the cause of justice. Once the prisoner has been put to death by the state there can be no relief granted although later developments in the evidence of the case or of the controlling law may show, conclusively, that the penalty was mistakenly inflicted.[3] Again, I quote from the opinion of the Supreme Judicial Court of Massachusetts in the Watson case:

> "The 'irreversible finality of the execution of a criminal defendant,' [Commonwealth v. O'Neal, 369 Mass. 242, 276 n. 1, 339 N.E.2d 676, 695 n. 1 (1975)] (Wilkins, J., concurring), could frustrate such efforts to see that justice is applied equally when changes in the law occur or when new evidence is discovered. While this court has the power to correct constitutional or other errors retroactively by ordering new trials for capital defendants whose appeals are pending or who have been fortunate enough to obtain stays of execution or commutations, it cannot, of course, raise the dead."
>
> Watson, supra, at 1282.

> "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights

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[3] The reality of the danger of convicting and punishing an innocent person is shown by our case, Forbes v. State, Tenn., 559 S.W.2d 318 (1977). Forbes was convicted of rape and served five years of a very long sentence in the penitentiary before he was pardoned recently by Governor Alexander after the police and the prosecuting attorney acknowledged that a mistake had been made and recommended that the Governor pardon Forbes. One shudders to think of the fate of Forbes if rape had been punishable by death.

> to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws."
>
> Furman v. Georgia, supra at 290 (1972) (Brennan, J., concurring).

> "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."
>
> Thomas Jefferson (quoted in E. Block, And May God Have Mercy . . . , 1 [1962]).

C. Infliction of Pain Upon The Prisoner.

The death penalty is now unique in its designed infliction of both mental and physical pain upon the prisoner. This was pointed out by Mr. Justice Brennan in Furman v. Georgia, supra, at 287-88, as follows:

> "Since the discontinuance of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F.2d 571 (CA 8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."

See also, People v. Anderson, supra, 6 Cal.3d at 649.

The barbarous nature of the death penalty and especially of the mental cruelty which it inflicts upon the prisoner has been vividly expressed by Justice Liacos of the Massachusetts Supreme Judicial Court, as follows:

"The imposition of the death penalty is disguised by the language and technique of abstraction. 'Indeed, no one dares speak directly of the ceremony. Officials and journalists who have to talk about it, as if they were aware of both its provocative and its shameful aspects, have made up a sort of ritual language, reduced to stereotyped phrases. Hence we read at breakfast time in a corner of the newspaper that the condemned "has paid his debt to society" or that he has "atoned" or that "at five a.m. justice was done."' A. Camus, Reflections on the Guillotine, in Resistance, Rebellion, and Death 132 (1960). Consistent with the views of Camus, of authorities cited elsewhere in this opinion, and of the majority, are the experiences described by Henry Arsenault, a convicted murderer sentenced to death in this Commonwealth. See Arsenault v. Commonwealth, 353 Mass. 575, rev'd 393 U.S. 5 (1968). See also, Commonwealth v. Devlin, 335 Mass. 555 (1957). Arsenault is presently an inmate at the Massachusetts correctional Institution at Norfolk and has submitted a brief pro se as amicus curiae. His brief tells his story.

"For over two years, Henry Arsenault 'lived on death row feeling as if the Court's sentence were slowly being carried out.' Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. 'There was a day to day choking, tremulous fear that quickly became suffocating.' If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither privacy nor dignity. Apart from the guards he was alone much of the time as the day of his execution neared.

"And on the day of the execution, after three sleepless weeks and five days' inability to eat, after a night's pacing the cell, he heard the warden explain the policy of the Commonwealth - no visitors, no special last meal, and no medication. Arsenault asked the warden to let him walk to the execution on his own. The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not be for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind the one-way mirror. When the executioner tested the chair, the lights dimmed. Arsenault heard other prisoners scream. After the chaplain gave him last rites, Arsenault heard the door slam

shut and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him. And he was moved off death row.

". . . The raw terror and unabating stress that Henry Arsenault experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.

"Death is the 'king of terrors.' Job 18:14. . . . So deep is the fear of death and the corresponding desire for transcendence that Christian thought attributes death to the fall of Adam, and the New Testament proclaims Christ's victory over death. 1 Corinthians 15:20, 26.

* * *

"The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement."

Watson, supra, at 1289-92 (Liacos, J., concurring) (footnotes omitted)

In a footnote, Justice Liacos further states,

"My argument that the ordeal imposed on the condemned is cruel and unusual punishment does not depend on the existence of lengthy delays between sentence and execution. Two months -

or, for that matter, one day - of torture offends the Constitution. As C. Duffy, a former warden of California's prison at San Quentin has described, 'One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.' C. Duffy & A. Hirshberg, 88 Men and 2 Women, 254 (1962)."

Id. at 1291, n. 5 (Liacos, J., concurring).

D. Unnecessary killing is cruel.

Finally, the death penalty is absolutely unnecessary as a punishment and, therefore, is cruel.[4] Society would be adequately protected from the condemned murderer by his permanent imprisonment; killing him is not necessary.

Our law recognizes only one instance in which a deliberate killing is justified, viz., one may kill another in his own or another's necessary self-defense. This being true, how can the whole body of individuals making up "The State" be justified in killing a person when it is unnecessary to do so for the protection of the people of the state? See Capital Punishment, 56 T. Sellin (1967 edition). By any modern concept of the term "cruel," the deliberate and unnecessary killing of a human being is cruel, whether done by an individual or by the State.

"In society where the force of all is mobilized against one, what principle of justice authorizes it to impose death? ... . A victor who would kill his captured enemies is called barbaric! A man who butchers a child whom he can disarm and punish seems like a monster! An accused condemned by society is like a conquered and powerless enemy; he is weaker before it than a child is before a man."

Robespierre (quoted in Hornum, "Two Debates: France, 1791; England, 1956," in Capital Punishment 65-66 [T. Sellin ed. 1967]).

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[4] "The principle that a severe punishment must not be excessive does not, of course, mean that a severe punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment, no matter how necessary, would be intolerably offensive to human dignity. The point is simply that the unnecessary infliction of suffering is also offensive to human dignity."

Furman v. Georgia, supra, at 281 n. 26 (Brennan, J., concurring).

With respect to the question whether the death penalty is necessary, the Supreme Court of California, in holding that its death penalty statute violated the "cruel or unusual" punishments clause of its state constitution, said in People v. Anderson, supra:

> "The People concede that capital punishment is cruel to the individual involved. They argue, however, that only 'unnecessary' cruelty is constitutionally proscribed, and that if a cruel punishment can be justified it is not forbidden by article I, section 6, of the California Constitution. We need not decide here whether our Constitution permits the infliction of 'necessary' cruelty as punishment for crime, because respondent has not demonstrated that the death penalty can be justified as necessary to any state interest.
>
> "In seeking to justify continuance of capital punishment, the People argue that it furthers three of the four acknowledged purposes of punishment. Respondent concedes that death is in no way rehabilitative, but contends that capital punishment may be legitimately imposed in retribution for serious offenses, that it serves to isolate the offender, and that the existence of the death penalty acts as a deterrent to crime. None of these purposes is shown to justify so onerous a penalty as death.
>
> "Although vengeance or retribution has been acknowledged as a permissible purpose of punishment under the Eighth Amendment (Williams v. New York (1949) 337 U.S. 241, 248, 69 S.Ct. 1079, 93 L.Ed. 1337), we do not sanction punishment solely for retribution in California. (In Re Estrada (1965) 63 Cal.2d 740, 745, 48 Cal. Rptr. 172, 408 P.2d 948.) We are fully aware that many condemned prisoners have committed crimes of the utmost cruelty and depravity and that such persons are not entitled to the slightest sympathy from society in the administration of justice or otherwise. Nevertheless, it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance.
>
> "Admittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. Society can be protected from convicted criminals, however, by far less onerous means than execution. In no sense can capital punishment be justified as 'necessary' to isolate the offender from society."
>
> 100 Cal. Rptr. at 167-68, 493 P.2d at 895-96.

I find that I am in agreement with the views thus expressed by the California Supreme Court. Life imprisonment without parole is an alternative that serves the functions of severely punishing the criminal and permanently protecting the society from the possibility of a repeated offense.

Some writers have attempted to justify the death penalty on the grounds that society needs to kill some criminals in order to deter others from potential crimes. After a century of debate, investigators and scholars are in disagreement, at best, about whether the death penalty in fact does deter crime; indeed, some argue that it has the opposite effect. To prove that the death penalty, in particular, is a deterrent would require more than proof that the possibility of punishment, in general, deters crime. The proof would have to show that there are potential crimes that are not committed because of the existence of the death penalty and that they would be committed otherwise. Such an inquiry, by its nature, would be highly speculative. In any event, my view is that, for the reasons discussed herein, the death penalty is a cruel and unusual punishment for the person upon whom it is inflicted and is, therefore, unconstitutional. Were it positively shown that the death penalty has a deterrent effect on others, it would still be unconstitutional because it is a cruel and unusual punishment for the person upon whom it is inflicted. In other words, deterrence, or the lack thereof, is irrelevant to the constitutional issue whether a particular punishment is cruel and unusual. Deterrent effect cannot save a cruel and unusual punishment.

E. Arbitrariness and capriciousness of the penalty.

I am convinced that it is inevitable that the death penalty will be applied capriciously and arbitrarily.[5] Again, I quote approvingly from the opinion of the Massachusetts court in Watson:

> "We know that, each year during the decades of the 1930s through the 1960s, thousands of persons were convicted of criminal homicides in states where death was an authorized punishment for those crimes. However, death was inflicted in only a minute fraction of those cases. 'When a country of over 200 million people inflicts an unusually severe punishment no more than fifty times a year, the inference is strong that the punishment is not regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.' Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring). No rational basis can be offered to explain why the few were executed and many others were not. It cannot be said that only the 'worst' offenders were executed. All murderers are extreme offenders. Fine distinctions, designed to select a very few from the many, are inescapably capricious when applied to murders and murderers. As a consequence, the death penalty is 'wantonly and . . . freakishly' inflicted. Furman v. Georgia, supra, at 310 (Stewart, J., concurring)."
>
> Watson, supra, at 1283-84.

I also agree with the Massachusetts court that while unguided jury discretion is intolerable, statutory guidelines cannot cure that uncertainty entirely; the subtle distinctions in the elements of crimes can be virtually impossible to define with certainty.

---

[5] See, generally, C. Block, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Block, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath. U. L. Rev. 1 (1976).

"As Mr. Justice Harlan wrote in McGautha v. California, 402 U.S. 183, 204, 91 S.Ct. 1454, 1465, 28 L.Ed.2d 711 (1971): 'Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history . . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and app .ed by the sentencing authority, appear to be tasks which are beyond present human ability.'

"A basic criterion, for example, in 'channeling' the death penalty decision lies in the choice between first and second degree murder. Mr. Justice Cardozo said of the distinction between degrees of murder, that it is 'so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.' Cardozo, What Medicine Can Do For Law, in Law & Literature 100-101 (1931)."

Watson, supra, at 1284.

I think the Massachusetts court is correct in its conclusion that even if guidelines could cure the arbitrariness in the jury's determination of the crime and the sentence, the death penalty still would be arbitrarily inflicted because of the unguided, discretionary powers exercised by others in the judicial process:

"Power to decide rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges. (Footnote omitted.)[6] In the totality of the process, most life or death decisions will be made by these officials, unguided and uncurbed by statutory standards. In any given case, decisions rest upon such considerations as the level of public outcry.

"Furman stands indifferent to the exercise of the prosecutor's 'untrammeled discretion.' For reasons which may be valid in the context of his duties, but which do not assist evenhandedness, the prosecutor in a homicide case may forego

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[6] I would add Governors to this list.

a first degree murder indictment and seek an indictment for second degree murder or a lesser charge. Also, in a first degree murder case, perhaps pursuant to plea bargaining, the prosecutor may in his uncurbed discretion nol prosse that part of the indictment which charges murder in the first degree. Similarly, the judge may dismiss the first degree murder charge, in his sole discretion, pursuant to accepting a plea of guilty to a lesser offense.[7]

"We do not think that our comments denigrate the general administration of criminal justice, or the good will of those who administer the system. It can be said that these officials must necessarily have these discretionary powers in the exercise of most of their functions. Nevertheless, the criminal justice system allows chance and caprice to continue to influence sentencing, and we are here dealing with the decisions as to who shall live and who shall die. With regard to the death penalty, such chance and caprice are unconstitutional under art. 26 . . . ."

Watson, supra, at 1285 (footnote omitted).

"We have a response to those who might argue that our comments as to arbitrariness and discrimination apply as well to all punishments, not merely to the death penalty. While other forms of punishment may also be arbitrary in some measure, the death penalty requires special scrutiny for constitutionality. 'The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.' Furman, supra, 408 U.S. at 306, 92 S.Ct. at 2760. (Stewart, J., concurring). Accord, Commonwealth v. O'Neal, 369 Mass. 242, 249, 339 N.E.2d 676 (Tauro, C.J., concurring). '[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.' Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Our society's failure to bring even-handedness to the entire spectrum of criminal punishment calls for great and persistent effort

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[7] Two of our recent cases serve as examples: Cozzolino v. State, supra, and State v. Berry, 592 S.W.2d 553 (Tenn. 1980). Both Cozzolino and Berry were convicted of first degree murder and sentenced to death. On appeal this Court ordered new trials. Upon the second trial, after a change of venue, Cozzolino's punishment was fixed at life imprisonment. After Berry's case was remanded for a new trial, his counsel and the prosecutor made a plea bargain that resulted in a sentence of life imprisonment. Same defendants, same crimes, same cases; but very different sentences resulted from the second proceedings.

toward improvement. However, we are not required to abandon all such punishments on constitutional grounds. At the same time, the supreme punishment of death, inflicted as it is by chance and caprice, may not stand."

Id. at 1286.

See also Furman v. Georgia, supra, at 286-300 and 287 n. 34 (Brennan, J., concurring); Lockett v. Ohio, supra, at 604-05 (opinion of Burger, C.J.).

I would apply the foregoing reasoning to the Tennessee death penalty statute and hold that it is a cruel and unusual punishment prohibited by Article I, Section 16, of the Tennessee Constitution because, inevitably, it is arbitrarily and capriciously imposed.[8]

Conclusion.

The death penalty issue is a very complicated one; much more could be said about the subject than I have said. I adopt the following conclusion from the opinion of the California court in People v. Anderson, supra, to wit:

> "We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: 'When we abolished the punishment for treason that you should be hanged, and then

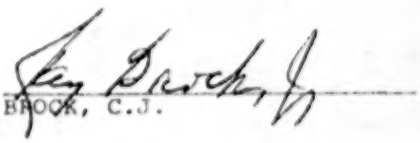
---

[8] I have treated arbitrariness and capriciousness of the infliction of the death penalty as an aspect of its being "cruel and unusual," as most courts have done. In my opinion this objection may also be considered as a lack of "due process."

cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.' (268 Hansard, Parlimentary Debates (5th Series) (Lords, 43d Parl., First Sess., 1964-1965) (1965) p. 703.)"

100 Cal. Rptr. at 171,
493 P.2d at 899.

I would hold that the death penalty, under all circumstances, is a cruel and unusual punishment prohibited by Article I, Section 16, of the Constitution of Tennessee. Therefore, I dissent from the imposition of the death penalty in this case.



BROCK, C.J.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

For Publication
April 27, 1981

STATE OF TENNESSEE,

Plaintiff-Appellee,

vs.

WILLIAM EDWARD GROSECLOSE and RONALD EUGENE RICKMAN,

Defendants-Appellants.

Shelby Criminal No. 5

FILED
APR 27 1981
JEWEL REDDEN, CLERK

ORDER

Appellants, William Edward Groseclose and Ronald Eugene Rickman, have filed petitions for rehearing. These have been considered by the Court and are found to be without merit. The petitions accordingly are overruled.

In each petition it is urged that the Court overlooked the "proportionality review" required by Gregg v. Georgia, 428 U.S. 153 (1976) and by T.C.A. § 39-2406(c).

This matter was not overlooked. Near the conclusion of the opinion, the Court stated that by any standard of comparison, the facts and circumstances of this case justify the imposition of the death penalty. A case with facts so aggravated and shocking can scarcely be conceived, and no similar case or cases in which the death penalty has not been imposed in circumstances similar to those shown in this record has come to our attention.

The contention that the statutory aggravating circumstances used against appellants are void for vagueness and overbreadth was addressed by this Court at some length in its opinion

in the case of State v. Dicks, released on February 2, 1981, particularly with reference to T.C.A. § 39-2404(i)(5). The Court there sustained the constitutionality of the statute, and we are of the opinion that its application to the facts of the present case is consistent with the interpretation stated in the Dicks case, supra.

The petitions for rehearing and for stay of sentence are overruled without prejudice, however, to the right of appellants to seek reconsideration of a stay if and when a proper application for review by the Supreme Court of the United States is filed.

Mr. Chief Justice Brock adheres to the views expressed in his dissenting opinion in these cases and in the Dicks case, supra.

William J. Harbison

William J. Harbison, Justice

Fones & Cooper, JJ., concur.
Brock, C.J., dissents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Tennessee Code--

39-2406. Death sentence — Appeal — Automatic review by Supreme Court — Automatic life sentence when death sentence precluded. —

(c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether (1) the sentence of death was imposed in any arbitrary fashion; (2) the evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances; (3) the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

39-2404. Punishment for murder in first degree — Sentencing proceeding — New trial. —

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

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(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

United States Constitution--

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

tion 1. . . . qual protection of the laws
. . . nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Supreme Court Rules--

Rule 47

The report, a copy of which is appended to this rule, shall be completed in its entirety by the trial judge in all first degree murder cases in which life imprisonment or a sentence of death is imposed. In the event more than one defendant is convicted in a first degree murder case, a separate report shall be completed for each defendant.

The report shall be submitted to the defendant's counsel for such comments as he desires to make concerning the factual accuracy of the report. If counsel desires, his comments in response shall be attached to the report.

This report shall likewise be submitted to the attorney for the state who may also attach his comments to the report.

It shall be the responsibility of the trial judge to compile, or cause to be compiled, all information required by this rule, to certify its accuracy, and to transmit it forthwith to the Supreme Court after denial of motion for new trial. A duplicate copy shall be included in the technical record.

[Added Feb. 24, 1978.]

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-6864

ORIGINAL

WILLIAM GROSECLOSE,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory aggravating circumstance in Tenn. Code Ann. §39-2404(i)(5) is unconstitutionally void for vagueness and overbreadth.

2. Whether the sentence of death as applied to petitioner was disproportionate.

3. Whether the Tennessee statutes and rules on comparative review of death sentences render the imposition of a death sentence unconstitutional.

4. Whether the non-inclusion of final argument, to which no objection was raised and on which no issue was questioned in the motion for new trial, deprives petitioner of due process of law.

5. Whether excusing prospective jurors who made it unmistakably clear that they could not consider imposing a sentence of death violated petitioner's right to an impartial jury..

6. Whether the issue concerning handcuffs can be properly raised since there is no proof in the record that any prospective juror saw the petitioner in handcuffs.

7. Whether the Tennessee Supreme Court properly evaluated the record and found the minor Bruton violation to be harmless error.

8. Whether the jury instructions given were inconsistent with case law on the imposition of a sentence of death.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 142.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on February 17, 1981. Petitioner's petition to rehear was denied on April 27, 1981. Petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

William Edward Groseclose was indicted with Ronald Rickman, Barton Mount, and Phillip Britt for first degree murder by the Shelby County Grand Jury in September 1977 (R.[orders, pleadings, and minute entries] 2-5, 25-28). The jury selection process began on February 13, 1978, continued through, and was completed on February 17, 1978. During this voir dire, seventeen prospective jurors were excused by the trial judge because they explicitly expressed an inability to follow the law and instructions of the court on the death penalty. (R. [transcript of voir dire] 3, 22-26; 55-58; 294-297; 309-313; 315-316; 373-378; 426-431; 625-630; 711, 714-724; 743-748; 752-758; 995-1005; 1007-1016; 1042-1046; 1102-1119; 1194, 1196-1199, 1202-1206; 1277-1281).

The seven day trial commenced on February 18, 1978 and was completed on February 28, 1978. After due deliberation, the jury found petitioner and his two co-defendants Britt and Rickman guilty of first degree murder.

(R. [orders, pleadings, and minute entries] 160-161). During this phase of trial, after extensive testimony concerning the admissibility of co-defendant Britt's statements (R. [transcript of trial] 1116-1368), the trial judge ruled that these statements were admissible with certain redactions. (R. [transcript of trial] 1374-1383). The Assistant District Attorney General reviewed the redacted statement for Sergeant East prior to the resumption of his testimony. (R. [transcript of trial] 1383).

In his testimony, Sergeant East made the following statement concerning an oral statement made by co-defendant Britt prior to Britt's giving either his taped or typed statement. Britt stated that "he had become involved approximately four weeks ago when he was approached by Bill Groseclose about having Debbie Groseclose killed. He stated--." (R.[transcript of trial] 1388). At that time, Britt's counsel moved for mistrial, based on Bruton v. United States, 391 U.S. 123 (1968) and White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1973). Petitioner Groseclose's counsel joined this objection (R. [transcript of trial] 1389). The state agreed that this testimony was objectionable and indicated that it was as surprised as the court and defense counsel by this statement. (R. [transcript of trial] 1391-1392). After consideration, the court denied the motion for mistrial (R. [transcript of trial] 1392-1394) and instructed the jury as follows:

> "Gentlemen of the jury: The court instructs this jury that if there is any evidence tending to show accusations in statements made against any defendant out of his presence and unheard by him, you are instructed not to consider such statements or accusations for any purpose whatsoever in determining the guilt or innocence of any defendant. Do I make myself clear? [all jurors nodded affirmatively.]" (R. [transcript of trial] 1395).

Subsequently, during the penalty phase of the trial, Britt testified and affirmed the contents of each of his statements including the inculpation of petitioner Groseclose. Britt was available for cross-examination at that time. (R[transcript of trial] 2094).

On March 1, 1978, the sentencing hearing began. It continued through and completed on March 3, 1978. After due deliberation, the jury returned its verdict on March 4,, 1978, fixing the sentence for petitioner Groseclose and defendant Rickman at death. The jury unanimously found the following statutory aggravating circumstances: (1) the defendant employed another to commit murder for remuneration; and (2) the murder was especially heinous in that it involved depravity of mind. The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the listed statutory aggravating circumstances. (R.[orders, pleadings, and minute entries] 167).

Petitioner Groseclose filed a timely motion for new trial and amendment thereto but did not raise any issues concerning improper excusal of prospective jurors, the court's jury instructions, the prospective juror's "viewing" of petitioner in handcuffs, or closing argument of counsel. (R.[orders, pleadings, and minute entries] 206-207, 209). This motion was overruled. The petitioner appealed to the Tennessee Supreme Court which affirmed the judgment.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such a question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

TENN. CODE ANN. § 39-2404(i)(5) IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

Petitioner contends that Tenn. Code Ann. § 39-2404(i)(5), an aggravating circumstance, which provides "the murder was especially heinous, atrocious, or cruel in that it involved tortue or depravity of mind," is vague and unconstitutional. The same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) in which this court held that an identical aggravating circumstance under the Florida death sentence statutes was not impermissibly vague as it had been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright , 578 F.2d 582, 610-612 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979).

The Florida Supreme Court construed this provision

to be directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 183 So.2d 1, 9 (Fla. 1973). The Florida Supreme Court also recognized that this provision was directed by its legislature at something "especially" heinous, atrocious or cruel. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In Dicks v. State, 615 S.W.2d 126, 132 (Tenn. 1981), the Tennessee Supreme Court approved these constructions of this aggravating circumstance. The court specifically found this construction applicable to this case. 615 S.W.2d at 151. The trial judge's instructions to the jury in the instant case are compatible with these constructions. (R.[transcript of trial] 2447). Such a construction is applicable in the instant case. The factual circumstances which the jury found in the instant case, the death by systemic hyperthermia, "cooking," of this victim in the trunk of her car which had been abandoned with the participants' knowledge that the victim was alive, show that such an interpretation is applicable in the instant case. 615 S.W. at 148 and 151. These facts do not show an improper application of this aggravating circumstance. See Godfrey v. Georgia, 446 U.S. 420 (1980).

II.

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE IN THIS CASE.

Under Tenn. Code Ann. § 39-2406(c) the Tennessee Supreme Court is required to determine whether the evidence supports the jury's finding and whether or not the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." In this case, the

Tennessee Supreme Court applied this standard finding that "By any standard of comparison, where the public policy of a jurisdiction, as reflected in its statutes, authorizes the death penalty, the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants [Groseclose and Rickman]"615 S.W.2d at 150. When this issue was again raised in the petition to rehear the Tennessee Supreme Court found that "[a] case with facts so aggravated and shocking can scarcely be conceived, and no similar case or cases in which the death penalty has not been imposed in circumstance similar to those shown in this record has come to our attention." Id. Such findings show that a sufficient proportionately review has been conducted. See Proffitt v. Florida, 428 U.S. 242, 259 n. 16 (1976); State v. Shaw, 255 S.E.2d 799(S.C.), cert. denied 444 U.S. 957 (1979).

Petitioner Groseclose also contends that the application of the death penalty to him is disproportionate since co-defendant Britt did not receive a death sentence. The Tennessee Supreme Court properly rejected this argument. The petitioner's argument would support a mandatory death penalty such as those found unconstitutional in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). Such a death penalty lacks the focus on the character and propensities of the individual defendant. In the instant case, co-defendant Britt's testimony shows his youthful age, 20 years; his repentance at having committed this crime, which he acknowledged committing; and the possible influence or domination by co-defendant Rickman in his participation. None of these factors are available for petitioner Groseclose. He was the initiator of

this crime. In fact, he used the crime as a means for obtaining a release from marital and financial problems. In Austin v. State ____ S.W.2d ____ (Tenn. 1981), the jury also found statutory aggravating circumstance 4, inter alia, outweighed any mitigating circumstances. In that case a death sentence was imposed on the individual who had hired other persons to kill the sole witness against him in a criminal case.

Petitioner Groseclose also complains that the jury should have been allowed to hear the evidence of Ralph Hadley and Hugh Stanton concerning negotiations of a guilty plea. This evidence refers only to co-defendant Britt (R.[transcript of trial] 1956-2010) and is irrelevant to the jury's consideration in this particular case. Groseclose, 615 S.W.2d at 149-150. Lockett v. Ohio, 438 U.S. 586, 604 n. 12 (1975).

III.

THE TENNESSEE PROVISIONS FOR APPELLATE REVIEW ARE CONSTITUTIONALLY SUFFICIENT.

Tenn. Code Ann. § 39-2406 is patterned after the appellate provisions of Georgia's statutes. Tenn. Code Ann. § 39-2406 does not, however, require specific referral to the cases compared in determining the proportionality of the sentence as is required by the Georgia statute. See Gregg v. Georgia, supra 420 U.S. at 205 n. 56. However, this court in Proffitt v. Florida, supra 428 U.S. at 259, held that where the appellate court made such a proportionality comparison, the statute, as interpreted, provided for sufficient appellate review. This court made such review in this case. 615 S.W.2d at 150.

IV.

THE NON-INCLUSION OF THE TRANSCRIPT OF ARGUMENT OF COUNSEL DOES NOT DEPRIVE PETITIONER OF DUE PROCESS.

Trial counsel for petitioner Groseclose certified the trial transcript as complete for purposes of his appeal (R. 238-239; Volume 28). Petitioner raised no issue concerning this argument. The non-inclusion of this argument does not show a due process violation or warrant the grant of the writ of certiorari. See Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, 96 (1978) cert. denied 439 U.S. 991 (1978).

V.

PROSPECTIVE JURORS WHO MADE IT UNMISTAKABLY CLEAR THAT THEY COULD NOT CONSIDER THE DEATH PENALTY WERE PROPERLY EXCUSED FOR CAUSE.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) and Lockett v. Ohio, 438 U.S. 586 (1978), this court held that the trial judge could properly excuse for cause any juror who explicitly expresses an inability to follow the law and instruction of the trial judge on capital punishment. Despite petitioner's not having raised this issue in his motion for new trial, the Tennessee Supreme Court after a complete review of the record concluded that these prospective jurors were properly excused for cause and noted that petitioner had not used his peremptory challenges.

Petitioner alleges that prospective juror Rose (R[transcript of voir dire] 1102-1119) constitutes the "most striking example" of the erroneous application of Witherspoon. This individual however states in response to questioning from the trial judge that under no circumstances could he vote to apply the death penalty. "I don't see how any evidence could be presented to make

me vote for the death penalty." (R.[transcript of voir dire] 1119). The trial judge thus properly excused this prospective juror for cause under existing decisions of this court.

VI.

THERE IS NO EVIDENCE IN THIS RECORD THAT ANY PROSPECTIVE JUROR SAW THE PETITIONER IN HANDCUFFS.

The petitioner's allegation is not documented in this record. (R.[transcript of voir dire] 695-696). Groseclose, 615 S.W.2d at 148. Upon such a basis, this issue, which was not raised in petitioner's motion for new trial, does not warrant the granting of a writ of certiorari.

VII.

THE TENNESSEE SUPREME COURT PROPERLY CONCLUDED THE BRUTON VIOLATION IN THE GUILTY PHASE OF THE TRIAL WAS HARMLESS ERROR.

The Tennessee Supreme Court found that the reference to Bill Groseclose through the statement of co-defendant Britt as related by Sergeant East was harmless error. 615 S.W.2d at 147.

The mere finding of a violation of the Bruton [v. United States, 391 U.S. 123 (1968)] rule does not automatically require reversal. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 394 U.S. 250 (1969). In Schneble, 405 U.S. at 430, this court stated "In some cases the properly admitted evidence of guilt is so overwhelming, the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Such a case is presented by the entire record

in this case. As this court stated in Schneble, "Judicious application of the harmless error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instruction, stares us in the face." 405 U.S. at 432.

The standard for reversal set forth in Schneble is "whether there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." 405 U.S. at 432. That standard when applied to this case is not met. This statement was made on February 26, 1978 in proceedings which had begun almost two weeks prior to that time. Defendant Groseclose's name was mentioned only once. No further reference was made to defendant Groseclose during the statements of co-defendant Britt. Both Bart Mount and Pamela Baker Lindsey had previously testified that defendant Groseclose had initiated and made such contacts. (R.[transcript of trial] 204-207); 643-644; 651-655). Two other witnesses testified that petitioner Groseclose had approached them about killing or having his wife killed. (R.[transcript of trial] 191-192).

The evidence against defendant Groseclose is overwhelming. All of this evidence had been previously presented to the trial court at the time of this solitary mention of defendant Groseclose in the statement. Under such circumstances, a mistrial was not warranted.

VIII.

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY DURING SENTENCING.

The Tennessee Supreme Court found, 615 S.W.2d at 147-148, that the jury instructions given closely followed the Tennessee statutes which the court had previously held constitutional. Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 251, 66 L.Ed.2d 117 (1980). Petitioner Groseclose raised no objections to these instructions in the trial court and also seeks to rely on his co-defendant Britt's special requested instructions (R.[transcript of trial] 2454-2455). Under such circumstances, the petitioner has not raised an issue which warrants the granting of the writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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